Supreme Court, U.S.
FILED

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LAWRENCE S. SCHWARTZ and SCHWARTZ, PISANO, SIMON, EDELSTEIN and BEN-ASHER, a partnership,

Petitioners,

vs.

WORRALL PUBLICATIONS, INC., a New Jersey Corporation; CHRIS GATTO and JOHN DOE (a fictitious name representing a party or parties unknown),

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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QUESTIONS PRESENTED

1. Is the New Jersey Appellate Division's decision in conflict with New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964), to the extent that "reckless disregard" is eliminated as a method of establishing actual malice?

2. What weight should be given to an unreasonable delay in the retraction of a false and defamatory publication when evaluating proofs of actual malice on summary judgment?

3. Was Petitioner Lawrence Schwartz improperly found to be a public figure, based upon information unrelated to his involvement in the controversy which allegedly gave rise to the defamation?

LIST OF ALL PARTIES

A list of all parties as required by Rule 14.1(b) is included in the caption.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court entered in this matter on September 21, 1993.

OPINIONS BELOW

Summary Judgment was granted in favor of Petitioners, and Respondent's cross-motion for summary judgment was denied by the Superior Court of New Jersey, Docket No. L-00803-90 (Law Div. January 3, 1992). Upon leave granted, the decision of the Superior Court Law Division was reversed and remanded for further proceedings by the Appellate Division of the Superior Court of New Jersey. Schwartz v. Worrall Publications, Inc., 258 N.J. Super. 493, 610 A.2d 425 (App. Div. 1992). Summary Judgment was entered in favor of the Respondents on all counts of the Complaint on November 30, 1992. Petitioners' appeal from this ruling was dismissed by the Appellate Division, No. A-2439-92T5 (App. Div. May 24, 1993), and Petitioners' motion for certification of an appeal pending unheard in the Appellate Division

was denied by the New Jersey Supreme Court without opinion, No. 36,858 (N.J. Sup. Ct. June 8, 1993). Petitioners' Petition for Certification was denied without opinion, No. 37,053 (N.J. Sup. Ct. September 21, 1993).

STATEMENT OF JURISDICTION

The final judgment of the New Jersey Supreme Court was entered on September 21, 1993. This Court has jurisdiction to review the judgment of the New Jersey Supreme Court pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution,

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution,

Amendment XIV, Section 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statutes Annotated,

2A:43-2:

> The defendant, in an action for libel against the owner, manager, editor, publisher or reporter of any newspaper, magazine, periodical, serial or other

publication in this state, may give proof of intention; and plaintiff, unless he shall prove either malice in fact or that defendant, after having been requested by plaintiff in writing to retract the libelous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, shall recover only his actual damage proved and specially alleged in the complaint.

STATEMENT OF THE CASE[1]

Respondent Worrall Publications, Inc. ("Worrall") is the owner and publisher of the Belleville Post, a newspaper which defamed Petitioners Lawrence S. Schwartz ("Schwartz"), a lawyer, and Schwartz, Pisano, Simon, Edelstein & Ben-Asher ("SPSE&B")[2], the law firm in which he is senior partner, in an article published on March 29, 1990. Respondent Chris Gatto ("Gatto") authored the defamatory article,

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[1] No trial was conducted of this matter, since the defense motion for summary judgment was granted in its entirety following remand by the New Jersey Superior Court, Appellate Division. Therefore, the statement of the case sets forth the Petitioners' factual contentions, consistent with those presented to the New Jersey Superior Court, Law Division.

[2] At the time of the acts complained of, the law firm was known as Schwartz, Pisano, Simon, Edelstein & Ben-Asher. It is now known as Schwartz Simon Edelstein Celso & Kessler.

which appeared on the front page of the Belleville Post, highlighted by blocking lines, with the headline "State Investigating Former BOE Attorney".[3] In its lead paragraph, the article falsely and maliciously reported that Schwartz, a former President of the New Jersey School Boards Association ("NJSBA"), was the target of a New Jersey State Commission of Investigation ("SCI") probe as the "recipient of allegedly excessive legal fees" while representing the NJSBA in an insurance controversy. This defamatory statement was a total fabrication, published solely to hurt Schwartz and his firm, and it was utterly baseless.[4]

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[3] "BOE" is an abbreviation for Board of Education.

[4] The article read as follows:

> A former Belleville school board attorney, who once served as president of the New Jersey School

Boards Association, is now the target of a state investigation as the recipient of allegedly excessive legal fees stemming from an ongoing insurance controversy.

The association, which employs a $70,000-a-year attorney to head its own staff, is awaiting the results of the investigation by the State Commission of Investigation into the fees charged by Livingston based attorney Lawrence S. Schwartz. The investigation is looking into losses sustained by the association's Insurance Group. The SCI Report is expected to be completed shortly.

Schwartz reportedly received close to $354,000 in private legal fees for his services to the organization. More than $500,000 has been expended by the NJSBA for legal services in regard to the investigation.

According to other reports, legal fees are expected to exceed $871,000 -- the amount allegedly lost in the group's insurance fund investment holdings.

In 1987, the discovery of the loss led to the suspension of Octavius T. Reid Jr., the organization's executive director, in addition to instigating

lawsuits and a state probe.

Schwartz, who is also a former Belleville school board member, served as the association president from 1976 to 1978. According to Frank Belluscio, a spokesman for the NJSBA, Schwartz's fees have totalled $353,851.

Belluscio said Schwartz was paid $297,617 to represent the association in its dealings with the SCI, the investigation now focusing on him. The balance was paid to the lawyer for representing the association in three separate lawsuits that arose from the loss.

Jeremiah Regan, the association's president, said Schwartz was hired by the group because of his familiarity with the school law and the association itself. The attorney represents 22 school boards in the state. Regan said he saw no possible conflict in hiring a former president.

Schwartz was hired without following the bidding process -- in accordance with the state law that permits contracting for services without bids.

The attorney said he charged

the association a "reasonable" fee of $175 per hour. They were not excessive and the fees were paid over a three-year-period, he said.

Schwartz served as a Belleville board of education member from 1970-79, returning as board counsel for about "seven or eight months later" in 1980, the attorney said. He was replaced after residents complained of excessive fees.

Several years ago, the association began the Insurance Group to help local boards cope with the costs of private liability premiums. Reid was both director of the organization and of the Insurance Group until the losses were disclosed, which were said to be generated by investments.

Shortly after the excessive director's suspension, the SCI got involved. He was eventually reinstituted and cleared of any wrongdoing.

Reid said the SCI probe had initially concentrated on the operations of the Insurance Group, but later the commission expanded its probe to include all operations.

The Trenton-based NJSBA has a

The true facts were that neither Schwartz nor his firm was under investigation by the SCI. Rather, the NJSBA was the subject of an investigation into losses by the New Jersey School Boards Insurance Group, and SPSE&B, with Schwartz as lead attorney, was representing the NJSBA in its dealings with the SCI. Nevertheless, the article went on to support the defamatory and false headline and first paragraph with innuendo and implication of other wrongdoing. The second paragraph implied that Schwartz's services were unnecessary,

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$7 million budget and operates solely on public funds. The entire budget comes from assessments on local school districts based on their student population. The group provides services to school boards, such as training new board members, negotiations and legal help.

since the Association employed its own $70,000.00 per year staff attorney. The article characterized Schwartz's legal fees as "private," and, by reference to his former presidency of the NJSBA, implied some improper connection or collusion with the NJSBA. The article fostered this impression by reporting that Schwartz had been hired without public bidding.[5] This comment concerning the public bidding process immediately followed a denial by the president of the NJSBA, in obvious reply to a reporter's question, that a conflict existed.

The clear focus of the article was upon Schwartz, supposedly targeted by the

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[5] The statement that Schwartz had been hired without public bidding was followed by another, indicating that public bidding was not required. This supports the inference that the comment was included to foster the intended impression of collusion.

SCI for allegedly charging excessive fees to the NJSBA, an agency funded by public monies. The story's sting, however, was even more broad. The article implied that Schwartz, through his firm, charged excessive fees to government agencies including the NJSBA and possibly the Belleville School Board and that there may have been some conspiratorial conduct, or at least a conflict of interest, between Schwartz and the NJSBA, based on Schwartz's former presidency and the award of the job without public bidding.

In short, the article was an intentional and malicious attack without foundation from any source. Worrall and Gatto admit that the article was false. They blame publication of the defamatory allegation on Belleville Post editor Joseph Cammelieri ("Cammelieri"), who claims that the false story appeared as a

result of a misunderstanding of Gatto's original draft. However, several facets of this explanation are simply incredible, and the actual circumstances require a different conclusion.

Cammelieri and Gatto agree that they discovered that the story was wrong almost immediately after it was published. Cammelieri claims that Gatto's initial draft of the story was reviewed by Cammelieri and Gatto together upon publication of the article and discovery that its central allegation was false. Yet, Gatto's draft of the story was destroyed several days later, and David Worrall, president of Worrall, claims that he did not even find out about the problem article until SPSE&B wrote a letter on April 14, 1990 (17 days later) demanding a retraction.

Cammelieri admits that he knew of the

"error" on the day of publication and simply "forgot" to print a "correction" the next week. Gatto recalls that someone from the NJSBA called and informed Cammelieri of the error after the publication was released, but this also failed to result in a retraction or correction. No retraction was written until June 21, 1990, nearly 3 months after publication of the defamatory statements, and 5 weeks after suit was filed.

Additionally, the story contained obvious internal reasons to doubt the veracity of its own allegations. Gatto claimed that when the original draft of the article was submitted for editing, it contained no allegation that Schwartz had been targeted by the SCI. However, the article, even as edited, contained the following statements:

A) "The investigation is looking

into losses sustained by the association's insurance group."

B) "In 1987, the discovery of the loss led to the suspension of Octavius T. Reid, Jr., the Organization's Executive Director, in addition to investigating law suits and a state probe."

These statements clearly explain the focus of the SCI probe and the involvement of Schwartz in representing the NJSBA's interests. But, to Gatto's sentence "Belluscio said Schwartz was paid $297,617 to represent the Association in its dealings with the SCI . . .", Cammelieri admits he added the words ". . . the investigation now focusing on him." [emphasis added].

Cammelieri asserts that he was confused, but this assertion makes no sense. Obviously he read the article, at least through the seventh paragraph, because he changed paragraph 7 to add the

words ". . . the investigation now focusing on him." Cammelieri testified at his deposition:

> Q: . . . Before you changed anything in the story, did you come to the understanding that Mr. Schwartz was being investigated by the State Commission of Investigation for charging legal fees that were excessive?
>
> A: That was part of my confusion.
>
> Q: Tell me why you were confused and what you were confused about.
>
> A: I guess I have to back up a little here. Chris was not in the office that day, as he's already explained to you. I'm responsible for my stories in Nutley. So I have to worry about them. I have to worry about these stories for the front page. I have to worry about all the inside pages. So, you know, I'm responsible for a lot of things; and I have to get these newspapers out.
>
> Consequently, we seem to do it all at the last minute. So I have a lot of rods in the fire, so-to-speak. I'm doing this, that, and everything else all at once practically, trying to dummy the pages, read through everything.

So I read through it. I was confused. I was worried about the other stories that were going on. I was worried about my stories, that everything was okay, and I was confused. I thought I was clarifying it, and that's why I did what I did.

* * *

Q: Okay. So you read an article that you didn't understand.

A: That's correct.

Q: Chris was gone.

A: Correct.

Q: You didn't know what to do, but you needed twelve inches?

A: I don't want to put it in those terms, but, yeah, you could say that.

Q: And so you took your best guess at what he was trying to say, and you ran the story?

A: And I was trying to simplify it, yes, to make it more readable. People -- reports have shown that people get turned off to long sentences. They like short sentences. It keeps their interests better.

Q: You had to have recognized that because you didn't understand the

story, you could have been saying the wrong thing?

A: (No response.)

Q: I mean, particularly with regard to the headline which you invented?

A: (No response.)

Q: You had to know the risk was there that you were saying the wrong thing?

A: That's in the back of your mind.

Thus, with actual doubts as to the veracity of a critical allegation, and knowing that the allegation could have drastic consequences to the reputation of Schwartz and his legal business, Cammelieri admits that he disregarded that risk and published the story. This occurred notwithstanding the fact that he could have: (i) eliminated the story and printed something else; (ii) checked the Newark Star-Ledger article, which he knew

was the basis of Gatto's story;[6] (iii) asked someone else to read the story to attempt to clarify its intent; (iv) spoken to Gatto on any of the two or three times he called to clarify his intent[7]; or (v) left a note to Gatto to review the story upon his return to the office.[8]

The conduct described herein violates the Journalism Code of Ethics[9] and represents a gross violation of the

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[6] Gatto testified that he derived his story from an article in the Sunday Star-Ledger, published the Sunday previous to the release of his article.

[7] Gatto claims he called two or three times on his way back from Washington D.C. at approximately the time Cammelieri was editing the story.

[8] From Gatto's two or three telephone calls, Cammelieri knew Gatto was returning to the office to write an article about the rally in Washington he had attended.

[9] An editor who undertakes to change a reporter's story in substance bears the same duties as the reporter to investigate and verify.

principals of professional news reporting. There is no difference between the conduct exhibited here and the publication of a known falsehood.

REASONS FOR GRANTING THE WRIT

I. THE NEW JERSEY APPELLATE DIVISION'S DECISION IS IN CONFLICT WITH NEW YORK TIMES V. SULLIVAN, TO THE EXTENT THAT "RECKLESS DISREGARD" IS ELIMINATED AS A METHOD OF ESTABLISHING ACTUAL MALICE.

Despite the overwhelming factual history of actual lies fabricated about Schwartz and his firm, the Appellate Division held that Petitioner had failed to prove that a reasonable jury could find by clear and convincing evidence that Worrall acted with actual malice. In reaching this determination, the Appellate Division found that the record justified "a finding of an irresponsible and uncaring attitude on Worrall's part," that there may have been a "deviation from professional standards of reporting and publishing," and that "Cammelieri's slipshod editing may well have been very

negligent." Despite all of this, the Appellate Division held that no reasonable jury could find that Worrall published the defamatory article with reckless disregard of its truth or falsity. If this holding is not reversed, then newspapers in New Jersey may create lies with impunity, despite a body of constitutional law to the contrary.

The result of the Appellate Division's decision to construe Worrall's behavior as other than reckless is to blur the constitutional distinction between actual knowledge and reckless disregard of the truth. There is no other proof, above and beyond the overwhelming circumstantial evidence submitted by Schwartz, which could be produced to demonstrate reckless disregard without <u>also</u> proving actual

knowledge.[10] Thus, the import of the Appellate Division's decision is that any evidence short of actual knowledge of falsity is insufficient to overcome the standards set forth in New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964). If this was the intent of the United States Supreme Court when it decided New York Times, the Court would not have permitted recovery of damages by a showing of reckless disregard of the truth.

The use of circumstantial evidence to support an inference of actual malice has been expressly authorized. In Maressa v. New Jersey Monthly, 89 N.J. 176, cert.

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[10] Since a determination as to recklessness, as distinguished from negligence, requires proof of a defendant's state of mind, the evidence produced in libel cases will almost always be circumstantial. Schiavone Construction Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988).

den., 459 U.S. 907, 103 S. Ct. 211 (1982), the New Jersey Supreme Court held that while actual malice may not be based solely on the character of a published statement or solely on the defendant's failure to seek independent verification of the information, "the two in combination, however, may support a conclusion of recklessness." Evidence of the defendant's negligence, motive, and intent "may be adduced for the purpose of establishing, by accumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." Tavoulareas, supra, 763 F.2d at 1478. The practical effect of the Appellate Division's decision is to remove circumstantial evidence as a method of proving actual malice, because it now appears to require proof of actual knowledge in every case.

The Appellate Division decision in this matter has been rightly criticized for its adoption of a standard on summary judgment in liable cases which impermissibly allows a judge to invade a jury's province over factual determinations. Richard A. Gantner, Survey, 23 Seton Hall Law Review 385 (1992). Gantner noted that under current libel law, "the likelihood of success for a public figure is minuscule," since even where a defendant like Worrall demonstrates "an indifference to the truth, a public figure looses on libel unless he can show, with convincing clarity, actual malice on the part of the defendant."

> Because actual malice by clear and convincing evidence is the standard to be applied at trial, it is also the standard the judge must apply in deciding a summary judgment motion. To determine whether a claim is

> Constitutionally sufficient, the judge must resolve not merely that a reasonable jury could find actual malice, but that the actual malice is shown with convincing clarity. Therefore, the law requires the judge to invade the province of the jury by deciding what the jury must decide--whether it has found the evidence to be clear and convincing.

Id. at 389.

After noting that the Appellate Division recognized the difficulty of deciding libel cases on summary judgment, Gantner concluded that the Appellate Division went too far in its decision.

> The court failed to recognize, however, that allowing a libel case to be decided on summary judgment demands that the judge get into the minds of the jury. This should not be permitted. If a plaintiff adduces evidence that directly or inferentially provides the necessary elements to establish a libel action, then the defendant's summary judgment motion must fail without regard to the plaintiff's burden of proof. See Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 268 (Brennan J., dissenting).

Id. at 390.

The Appellate Division ruling impermissibly makes it impossible to establish reckless disregard without also proving actual knowledge of falsity. It is, therefore, contrary to the rule of New York Times v. Sullivan, supra, which created a specific distinction between the concepts of knowledge and reckless disregard, and must therefore be reviewed.

II. THE WEIGHT TO BE GIVEN TO AN UNREASONABLE DELAY IN THE RETRACTION OF A DEFAMATORY PUBLICATION, WHEN EVALUATING PROOFS OF ACTUAL MALICE ON SUMMARY JUDGMENT, IS AN IMPORTANT QUESTION WHICH HAS NOT YET BEEN DECIDED BY THIS COURT.

The analysis of whether a delayed retraction or the refusal to retract can constitute evidence of actual malice is fact specific. As set forth in New York Times Company v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 729 (1964):

> The Times' failure to retract upon respondents demand, although later retracted . . . is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here.

(emphasis added). Subsequent to the landmark decision in New York Times, several Courts addressed the issue, finding that the failure to retract a

statement demonstrated to be false and defamatory "might be relevant in showing recklessness at the time the statement was published". Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, 708 F.2d 944, 950 (5th Cir. 1983); Joan O. Holbrook v. Titus J. Casazza, et al., 204 Conn. 336, 349, 528 A.2d 774 (1987). Dean Prosser has also commented that "under certain circumstances evidence of a failure to retract might be relevant in showing recklessness at the time the statement was published". Restatement 2nd of Torts §580A, comment d. (1976).

While other cases have asserted that a failure to retract may sometimes prove that a defendant reasonably believed that the plaintiff had not been defamed, Connelly v. Northwest Publications, Inc., 448 N.W.2d 901, 905 (Minn. Ct. App. 1989), this would not apply where the defendant

admits the falsity of the article, admits that it knew of the error on the day of publication, and allegedly "forgot" to publish a retraction for three months, as is the case here. On the other hand, issuance of a prompt retraction has been held to be ". . .significant evidence to negate any inference of actual malice on part of the [defendant]." Hoffmann v. The Washington Post Company, 433 F. Supp. 600, 605 (D.D.C. 1970); See also Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir. 1987).

Relevant evidence of actual malice may often point in one direction or the other, depending upon the circumstance. The weight to be afforded such evidence should be left to the jury, since a refusal to retract a defamatory statement even after learning of clear error can justify the conclusion that such a failure displays a

blatant lack of concern for the damage done to the victim's reputation, which, in turn, reinforces the belief that such an attitude permeated the treatment of the story from the outset. Tavoulareas v. Piro, 763 F.2d 1472, 1477 (D.C. Cir. 1985) (Opinion on Rehearing En Banc).

Prior to the published opinion of the Appellate Division decision in this matter, no case had squarely addressed issue of whether an unreasonable delay in retraction could provide probative evidence of actual malice. Here, the Appellate Division held:

> [A]lthough we disagree with Worrall's position that a delay in printing a retraction never bears on the question of actual malice, we can not ascribe nearly as much evidential worth to the delay as Schwartz urges.

But, a delay of the length demonstrated here, coupled with the admitted falsity of the publication and

the seriousness of the accusation, can constitute clear evidence of the type of "reckless disregard" described in New York Times v. Sullivan, supra. A standard for weighing such evidence should be established.

In addition, N.J.S.A. 2A:43-2 provides that a delay in retraction may result in punitive damages, upon a finding that it was unreasonable. Because N.J.S.A. 2A:43-2 demonstrates a strong public policy in favor of the timely retraction of false statements, an unreasonable delay in retraction constitutes substantial evidence of actual malice. In Brogan v. The Passaic Daily News, 22 N.J. 139, 149, 123 A.2d 473 (1956), the New Jersey Supreme Court held that under N.J.S.A. 2A:43-2, a mixed question of law and fact exists as to whether the retraction was made within a reasonable length of time

"and if reasonable men can disagree in their conclusion with respect thereto, the question should be submitted to the jury in mitigation of damages." If a jury is entitled to find unreasonable delay pursuant to this statute and to award special damages, then it logically follows that the legislature intended to allow evidence of unreasonably delayed retraction to support a finding of malice.

Punitive damages for defamation are only constitutionally permissible where plaintiff has met the New York Times standard of actual malice. Gertz v. Welch, 418 U.S. 323, 350, 94 S. Ct. 2997, 3012 (1974). Since N.J.S.A. 2A:43-2 permits punitive damages for unreasonable delays in retraction, such delays in retraction have to be equated with actual malice in order to avoid constitutional infirmity.

In cases involving proof of actual malice, inquiry focuses on the actual state of mind of the defendants. Although state of mind is a subjective matter, it can be shown by indirect or circumstantial evidence, and sufficient indirect evidence of actual malice can defeat a defendant's unsupported statement that it acted in good faith. St Amant v. Thompson, 390 U.S. 727, 732, 88 S. Ct. 1323, 1326 (1968). Findings of actual malice have been upheld where a defendant fails to investigate a story weakened by inherent improbability, internal inconsistency, or apparently reliable contrary information. Curtis Publishing Co. v. Butts, 388 U.S. 130, 157-8, 87 S. Ct. 1975, 1992-3 (1967); Tavoulareas, supra, 763 F.2d at 1475. Likewise, when the only "source" of the story did not contain the statements supposedly derived from it, as is the case

here, courts have inferred that the defendant recklessly fabricated the story. Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976). Accordingly, although evidence of state of mind can often be demonstrated only through indirect or circumstantial evidence, under the facts of this case, the unreasonable delay in retraction is substantial evidence of actual malice, sufficient to preclude summary judgment.

The Appellate Division erred by failing to set forth a standard by which a lengthy delay in retraction may be considered to be evidence of actual malice. This issue, never determined by any court, was summarily disposed of by the New Jersey Superior Court Appellate Division, despite the fact that the length and circumstances of the delay in this case strongly support a finding of actual

malice.

This Court should now set forth a definitive rule to be applied to this and to other similar situations.

III. THE APPELLATE DIVISION DECISION IMPROPERLY FOUND PETITIONER LAWRENCE SCHWARTZ TO BE A PUBLIC FIGURE, BASED UPON INFORMATION UNRELATED TO HIS INVOLVEMENT IN THE CONTROVERSY WHICH GAVE RISE TO THE DEFAMATION, CONTRARY TO THE DECISION IN GERTZ V. WELCH, 418 U.S. 323, 39 S. CT. 2997 (1974).

The Appellate Division held that as to his representation of the NJSBA, Schwartz was a public figure. Petitioners argue that this was erroneous, because the Court erred in failing to set forth upon a standard for making such a determination and because events unrelated to the controversy which gave rise to the defamatory publication were improperly relied upon in determining Schwartz's status.

The initial inquiry in any defamation analysis is whether the victim is a public

or private figure. A determination of a person's status as a public official/public figure or a private individual is significant, because such status determines the standard of proof which must be met in order to establish compensable defamation. Public officials and public figures seeking punitive damages must prove that false statements were made with the knowledge that they were untrue or with reckless disregard for the truth (actual malice). New York Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S. Ct. 710, 726 (1964); Gertz v. Welch, 418 U.S. 323, 350, 94 S. Ct. 2997, 3012 (1974).

This determination as to status also determines the standard of proof which must be met in defense of a motion for summary judgment. Public official or public figure status requires a showing of

actual malice by clear and convincing evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513 (1986).

If a plaintiff is treated as a private individual, however, state guidelines are utilized. New Jersey summary judgment practice does not involve "a weighing of the evidence, an exercise which intrudes into the province of the jury." Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 156-7 (1986). In New Jersey, on a motion for summary judgment in a defamation case in which state of mind is at issue, the Court must decide "whether there is a genuine issue that any of the defendants displayed reckless disregard in publishing the . . . factual statements." Id. [emphasis added]. Because this inquiry goes to the state of mind of the defendant, it does not readily

lend itself to summary disposition. Id. See also Maressa, supra, n.10, citing Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9, 99 S. Ct. 2675, 2680 n.9 (1979).

Given the severe consequences of a determination that a plaintiff is a public figure or public official, a high standard of proof should be required. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 352, 94 S. Ct. 2997, 3013 (1974), the Court held that a defendant must demonstrate by clear evidence that a plaintiff is a public figure.

The Appellate Division concluded that Schwartz was a limited public figure as to matters connected to his representation of the NJSBA. In arriving at this determination, the Appellate Division relied on matters wholly apart from Schwartz's representation of the Association in the SCI investigation, such

as his involvement as the Association's past president. This consideration of factors not related to Schwartz's representation of the Association was inappropriate, because Gertz specifically instructed courts considering the limited public figure issue to look into the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Id. at 352, 94 S. Ct. at 3013. The Appellate Division not only failed to enunciate the standard employed, but compounded this error by its consideration of factors not related to Schwartz's representation of the Association.

The Appellate Division erred in summarily concluding that Schwartz was a public figure and failed to articulate a standard for the determination of this

issue on a motion for summary judgment. Given the significance of the determination, on a summary judgment motion this decision should be made under the clear and convincing evidentiary standard set forth in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986). Because the Appellate Division erroneously failed to articulate the standard of proof, and because matters unrelated to the dispute giving rise to the defamation were considered, the decision below contradicts applicable decisions of this Court and should be reviewed.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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